No. 71-905

In the Supreme Court of the United States

OCTOBER TERM, 1971

ARNOLD A. MORSE, SR. AND HELLEN V. MORSE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. A 1-10) is reported at 443 F.2d 1185.

JURISDICTION

The judgment of the Court of Claims was entered on June 11, 1971. Petitioner's motion for rehearing was

denied on October 15, 1971 (Pet. App. B). The petition for a writ of certiorari was filed on January 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States Employees Association of Tehran, Iran, organized under Section 921(b) of the Foreign Service Act of 1946, as amended, is an agency of the United States within the meaning of Section 911(a) of the Internal Revenue Code of 1954, so that the salary paid by the Association to petitioner,[1] as its assistant general manager, would not be excludable from his gross income.

STATUTE INVOLVED

The pertinent provisions of Section 911 of the Internal Revenue Code of 1954 are set forth in an Appendix to the petition (Pet. App. C 1-2).

STATEMENT

On August 30, 1965, petitioner entered into an employment contract with the United States Employees Association of Tehran, Iran (the "Association"), as its assistant general manager for a two-year period. The Association was organized by the American Embassy employees at Tehran, with the approval of the Ambassador, to provide its members with recreational

[1] References to "petitioner" are to Arnold A. Morse, Sr. Hellen V. Morse is a party only because she filed a joint income tax return with her husband for the taxable year in issue.

facilities and a commissary. Membership was limited to United States citizens in Iran, who are permitted, by an agreement between the United States government and Iran, to import goods duty-free for themselves and their dependents. The Association was established under the authority of State Department regulations (Foreign Affairs Manual, Vol. 6, Sec. 500 *et seq.*) issued pursuant to Section 921(b) of the Foreign Service Act of 1946, 60 Stat. 999, 1027, as amended, 22 U.S.C. 1139(b). (Pet. App. A 3.)

Under the regulations, an organization like the Association may be established only when the Ambassador decides one is needed. It is to be located, whenever feasible, on government property. The government furnishes space and equipment, and government funds are available when necessary to establish the organization. Working funds are obtained from members' deposits. The organization is required to operate under the detailed supervision of the Ambassador to make sure that it carries out its activities in accordance with the policies of the State Department. Upon liquidation, the assets of the organization, over and above membership deposits, belong to the State Department for distribution to other commissaries at other posts requiring financial assistance. The Ambassador is to see to it that all personnel are bonded, that there is adequate insurance, and that there are frequent audits. The organization is to furnish the Ambassador with monthly financial statements. (Pet. App. A 6-7.)

The constitution and by-laws of the Association are in accord with the regulations, and insure that the As-

sociation will carry on its affairs under the control and supervision of the Ambassador. Thus, the board of directors which manages the affairs of the Association is not elected by the members; instead, the Ambassador appoints the chairman of the board, and the other board members are appointed by the heads of the various government agencies with missions in Iran. All board actions are subject to review by the Ambassador. The members have the right to vote at annual and special meetings where they can amend the constitution, subject, however, to the Ambassador's approval. The constitution and by-laws further provide that the Ambassador may dissolve the Association and distribute its surplus funds. The United States is not liable for any debts of the Association, and the employees of the Association are not employees of the United States. (Pet. App. A 8-9.)

Section 911(a)(2) of the Internal Revenue Code of 1954 provides for the exclusion from gross income of amounts received from sources without the United States as earned income for services rendered by a United States citizen who is physically present in a foreign country for 510 days during any period of 18 consecutive months. Excepted from this exclusion are "amounts paid by the United States or any agency thereof." On his income tax return for 1966, petitioner claimed that the Association was not an agency of the United States and, therefore, that he was entitled to the exclusion.

The Court of Claims held on the undisputed facts that the Association is an agency of the United States, affording a means for the exercise by its members of

duty-free privileges under the control of the Ambassador, and that his control prevented abuses and conserved United States foreign exchange by channeling personal purchases of its members to products of United States origin. The court accordingly denied petitioner's motion for summary judgment and dismissed his complaint. It granted the government's cross-motion for summary judgment and its motion for judgment on a counterclaim. (Pet. App. A 8.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other basis for further review.

Petitioner's argument that the Court of Claims incorrectly concluded that his employer is an agency of the government falls with his misstatement of the facts. He erroneously describes the Association (Pet. 4-6) as a "voluntary organization" of "cooperative consumer-patrons who have joined collectively in the organization, operation and management of a strictly commercial business enterprise," which, owning all its assets, is "independent, self-functioning," "completely self-sufficient," "operating permissively with only the barest of guidelines and review," and which "executes and controls the administration of its policies through (a) Membership meetings, (b) the Board of Directors, (c) Special Committees, and (d) The General Manager *** and other employees subject only to the review of the Ambassador."

After examining the right of control of the Ambassador over the affairs of the Association as set forth in

the statute, the regulations, and in its constitution and by-laws, the Court of Claims concluded (Pet. App. A 9):

> We are sure that such is not the usual supervision exercised by Ambassadors "over any privately-owned business, operated by Americans, in a foreign land." We do not see how the Ambassador's power of control could have been any tighter, even if, as a matter of his own discretion, he allowed the members to decide many questions by themselves.

Furthermore, in contrast to petitioner's allegations that the Association was a "strictly commercial business enterprise" (Pet. 4), the Court of Claims pointed out that the Association serves and promotes the interests of the United States government by enabling the Ambassador to control the exercise of the duty-free privilege, (see *Artwohl* v. *United States*, 193 Ct. Cl. 382, 434 F. 2d 1319), and also by conserving United States foreign exchange, and thus aiding our balance-of-payments position.

In view of these facts, the cases cited by petitioner (Pet. 6) for his assertion that the court below applied an erroneous definition of the term agency of the United States, as used in Section 911(a)(2), are not in point. There is no confusion requiring clarification by this Court. On the contrary, the decision below is in accord with the three other applicable decisions on this question. *Standard Oil* v. *Johnson*, 316 U.S. 481; *Donaldson* v. *Commissioner*, 51 T.C. 830; and *Raffensperger* v. *Commissioner*, 33 T.C. 1097. *Standard Oil*

held that a regulated military post exchange was an agency of the United States constitutionally exempt from state taxation. *Donaldson* held that a regulated Foreign Service Act commissary in Karachi, Pakistan, was an agency of the United States under Section 911 of the 1954 Code, and the same result was reached earlier in *Raffensperger* with respect to a regulated military officers' club.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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